

9 FCC Rcd 2839, 2843; *Press*, 59 F.3d at 1370.

35. The evidence establishes that, in the Fall, 1991, RBC's counsel, Margot Polivy, had received a copy of a letter (Jt. Exh. 4) from the Office of Managing Director ("OMD") relative to the applicability of the *ex parte* rules to the litigation concerning RBC's applications. Tr. 383. The Court of Appeals expressly held that that letter "left no room for doubt that the FCC considered its *ex parte* rules applicable" to that litigation. *Press*, 59 F.3d at 1370. In her testimony, Polivy offered no valid explanation as to how she might have misunderstood the import of the OMD letter: she acknowledged that she read the letter, but she did not read the *ex parte* rule (Section 1.1208) cited in the letter, Tr. 410, nor did she seek clarification of the OMD letter from anyone at the Commission, Tr. 411. As a result, no evidence was presented to undermine the determination by the Court of Appeals that the OMD letter itself placed RBC on notice of the *ex parte* restrictions.

36. In addition, Paul Gordon, a Bureau staff attorney responsible for the processing of the RBC applications, testified that Polivy repeatedly called him about those applications and that he personally advised her on three or four occasions, beginning in March, 1993, that the RBC applications were a "restricted proceeding" within the meaning of the *ex parte* rules. Tr. 1018-21. Polivy conceded that she had called Gordon on a number of occasions, but she denied that she had attempted to address the merits of the applications or that Gordon had alerted her to the *ex parte* restrictions. Tr. 504-511.

37. This was essentially the state of the record before the Court of Appeals ^{22/} when it concluded that RBC

^{22/} The Court of Appeals had before it Gordon's sworn written testimony that he had told Polivy about the restrictions, and Polivy's written denials.

could not reasonably have believed the proceeding to be unrestricted because the FCC had repeatedly informed [RBC]'s counsel that it considered the adjudication to be restricted within the meaning of its *ex parte* rules.

Press, 59 F.3d at 1370. Since RBC offered no evidence altering the state of the record in any meaningful way, the determination of the Court of Appeals quoted above remains in effect: RBC could not reasonably have believed the proceeding to be unrestricted.

38. Nevertheless, the ALJ resolved the *Ex Parte* Issue in RBC's favor, concluding that Polivy reasonably believed that *ex parte* communications were not prohibited in this case. *I.D.* at ¶97. But that is precisely contrary to the governing determination of the Court of Appeals and, as such, is an impermissible conclusion here.

39. The ALJ reached his conclusion by ignoring the plain language of the OMD letter and the equally plain language of the Court of Appeals concerning that letter. *I.D.* at ¶99. He also elected to credit Polivy's testimony over Gordon's, although in so doing the ALJ made no adverse demeanor or credibility findings at all, particularly about Gordon. *I.D.* at ¶101. ^{23/}

40. With respect to the evidentiary conflict between Gordon and Polivy, there is absolutely no basis in any of the record to believe that Gordon was not telling the truth: he is

^{23/} The ALJ also sought to bolster his conclusion by speculating about what Bureau officials might have understood about the *ex parte* rules. *I.D.* at ¶102. This is especially surprising because the ALJ had held that the opinions of Bureau officials were irrelevant and he had refused to permit discovery into those opinions. *E.g.*, Memorandum Opinion and Order, 96M-57, rel. April 2, 1996. It is also surprising that the ALJ would attempt to suggest that Bureau officials may have been alerted to possible *ex parte* considerations by anything that RBC did when the evidence of record reflects that the Bureau officials in question all testified that RBC had never said or done anything at any point prior to or during the July 1, 1993 meeting which the Bureau officials understood to relate in any way to the applicability of the *ex parte* rules to RBC's applications. *See Press Exhs.* 19 (pp. 13-16), 20 (pp. 11-15), 21 (pp. 16-19). The ALJ's conclusions relating to the Bureau officials (*see I.D.* at, *e.g.*, ¶95) are plainly objectionable and must be reversed.

simply a Bureau attorney who testified, under subpoena, concerning matters which had arisen in the routine course of his responsibilities and in which he had no personal interest. The ALJ noted that Gordon's inability to recall what Polivy said and his failure to make a written report as required by the Commission's rules "undercut[] any reliance on his claim". *I.D.* at ¶28. But as to the latter point, Gordon testified that he was not aware of any requirement that he make a written report, Tr. 1042, so his failure to make one cannot seriously be deemed to weaken his testimony. And his inability to recall the substance of Polivy's remarks is equally unsurprising in view of the passage of three years since the conversations which were, by all accounts, relatively brief. There is no valid basis in the record to question the reliability of Gordon's testimony.

41. The same cannot be said of Polivy. Her client has a substantial stake in the outcome of this proceeding, and the allegations of *ex parte* misconduct involved her personally. Moreover, the record reflects a number of serious conflicts within her own testimony, conflicts which undermine her credibility. With respect to the Gordon conversations, for example, Polivy acknowledged that her calls were "aggressive status calls", Tr. 509, but she denied that she ever addressed the merits of the proceeding during those calls, Tr. 504-511. But according to her supposed theory of the *ex parte* rules, *see* Tr. 383, she herself was under no constraints and could have discussed the merits all she wanted. The ALJ himself asked her why, if she believed she could discuss the merits, she did not do so in her conversations with Gordon. She responded that she "had no reason to" because she "could not conceive . . . that the Commission staff would ever deny" RBC's applications. Tr. 505. But in March, 1993 -- before her calls to Gordon -- the Bureau staff had advised RBC that the staff "cannot conclude that grant of the [RBC] extension

application would serve the public interest." Jt. Exh. 6. Thus, contrary to Polivy's claim, she had clear and explicit reason to expect that the applications would be denied.

42. There are other reasons to doubt Polivy's veracity. During the early stages of discovery Press had sought from RBC copies of materials generated in connection with the Tower Litigation. Press (and the ALJ) were advised, however, that such materials were not available to RBC's communications counsel, Polivy, because she and her firm were not counsel for RBC in the Tower Litigation and she did not have documents from the Tower Litigation. Tr. 274-76. On that basis, the ALJ denied Press's document request.

43. But on the last day of RBC's direct case presentation, RBC sought to introduce as an exhibit a document, previously not produced during discovery, consisting of a pleading from the Tower Litigation. RBC Exh. 9 (offered but rejected, Tr. 984). That pleading reflected, on its signature page, that Polivy and her firm had (contrary to Polivy's representation) in fact been counsel of record for RBC in the Tower Litigation. Polivy also confirmed that this document was located in her firm's files. In addition, the Tower Litigation pleading included, as an attachment, a copy of a letter from Gannett to RBC which should have been disclosed during discovery, but which was not, ostensibly because RBC could not locate a copy in its files. ^{24/}

^{24/} The Gannett letter in question appears in the record as Press Exh. 6. The record reflects that, notwithstanding the discovery requests of both Press and the Separate Trial Staff, a number of documents which RBC acknowledged to be responsive to those requests were not disclosed until the very eve of the hearing. See Press Statement for Record, filed July 12, 1996 and attachments thereto. The precise circumstances surrounding the serendipitous finding of these documents after the close of discovery but immediately before exhibit exchange were not established on the record. The documents included letters (from Rey to Gannett) which in turn referenced other letters (from Gannett to Rey) which were not disclosed because RBC supposedly could not locate them. Upon receipt of these materials, Press undertook to obtain the missing letters directly from Gannett. Through those efforts
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44. These circumstances raised serious questions concerning the bona fides of RBC and Polivy in this case. Press submitted a Statement for the Record setting forth the relevant factual information. The ALJ, however, rejected that Statement, finding, *inter alia*, that Press's allegations "could not affect RBC's qualifications to be a Commission licensee". *Memorandum Opinion and Order*, FCC 96M-195, rel. August 22, 1996. But Press's allegations clearly raised a question concerning the veracity of representations made by Polivy in the course of this hearing, and Polivy was not only counsel herein, she was a witness. Thus, questions concerning her veracity cannot properly be ignored here. The ALJ's rejection of Press's Statement for the Record was erroneous, as was his failure to consider Polivy's conduct in discovery in assessing her truthfulness as a witness.

45. The ALJ also concluded that the communications between Bureau officials and Bush were not *ex parte* violations because Bush did not recall exactly what she had said. The record before the Commission and the Court of Appeals is clear that Bureau Chief Roy Stewart stated twice, under oath, that Bush had asked whether denial of the RBC applications was consistent with the Commission's minority ownership policy. *See, e.g., Press*, 59 F.3d at 1368. Bush did not deny that she asked Stewart that; rather, she simply did not recall doing so. Tr. 572-75. The ALJ concluded that Stewart should therefore have been called to "rebut" Bush's testimony, *I.D.* at ¶95. But there was nothing there to rebut: Stewart's position had long since been established, and Bush did not contradict it. The ALJ's attempt to reverse earlier conclusions of both the Commission and the Court of Appeals is completely

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Press was able to obtain Press Exh. 6 immediately prior to the hearing. As it turned out, though, one such Gannett letter to Rey was attached to the document which RBC found in Polivy's files and offered (without previous exchange among the parties) as RBC Exh. 9.


unwarranted and impermissible and must be rejected.

46. The record establishes that RBC intentionally violated the *ex parte* rules in a manner directly contrary to basic notions of due process. The ALJ's contrary conclusion should be reversed, and the Commission should conclude instead that RBC's *ex parte* violations warrant disqualification or, at a bare minimum, denial of RBC's applications. *See, e.g., WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir. 1961) ("[h]e who engages in [*ex parte* misconduct] in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding").

CONCLUSION

For the reasons stated above, the *I.D.* should be reversed, RBC's applications for extension of its construction permit should be denied, its application for consent to the assignment of the permit should be dismissed, the permit should be cancelled, and the call sign of Station WRBW(TV) should be deleted.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 16th day of May, 1997, I have caused copies of the foregoing "Consolidated Exceptions and Brief of Press Broadcasting Company, Inc." to be hand delivered (as indicated below) or placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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